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No. 87-398

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

RUSS BUILDING PARTNERSHIP,
a California general partnership,
Appellant,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Appellees.

On Appeal from the Court of Appeal of the State of California

APPELLEES' RESPONSE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

JAMES P. BENNETT
(Counsel of Record)
LEIGH R. SHIELDS
MORRISON & FOERSTER
345 California Street
San Francisco, California
94104-2105
Telephone: (415) 434-7000

Attorneys for Appellees Pacific Gateway Associates Joint Venture, Crocker National Bank and Crocker Properties, Inc.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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APPELLEES' RESPONSE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

APPELLEES' INTEREST

Appellant has designated Pacific Gateway Associates Joint Venture ("Pacific Gateway") and Crocker National Bank and Crocker Properties, Inc. ("Crocker") as appellees. Pacific Gateway and Crocker are each developers of downtown office buildings upon whom the City and County of San Francisco ("the City") has imposed the $5 per square foot transit fee. As applied to *each* of these appellees, based upon the square footage of their office properties, the transit fee is nearly *$2.5 million.*

Pacific Gateway and Crocker were plaintiffs in actions below challenging the constitutionality of the Transit Impact Development Fee Ordinance. These actions were consolidated with the Russ Building Partnership case in the California trial court and

Court of Appeal. In these actions, appellees asserted Takings Clause, Due Process and Equal Protection challenges to the validity of the Transit Impact Development Fee Ordinance under the Fifth and Fourteenth Amendments. The California courts rejected each of these challenges.[1] Pursuant to Rule 10.4 of the Rules of this Court appellees file this response in support of appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

In June of 1978 the California voters, by a ballot initiative known as "Proposition 13," enacted an amendment to their state constitution placing limitations upon the ability of local governments to assess property taxes and other special taxes. California Constitution, Article XIIIA, §§ 1 and 4. In prior years the City had operated the Municipal Railway, the City's public transit

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[1] In addition to these grounds, Pacific Gateway and Crocker challenged the retroactive application of the transit fee to their office projects (for which building permits had been issued two years prior to the enactment of the Ordinance) as a violation of their vested rights. This separate challenge to the Ordinance was also based upon the Fifth and Fourteenth Amendments. This challenge was sustained by the California Court of Appeal in Part V of the decision here appealed from by the Russ Building Partnership. (Jurisdictional Statement, Appendix A, pp. A-11 through A-16.)

The City petitioned for review by the California Supreme Court of that portion of the Court of Appeal's opinion sustaining appellees' vested rights claims. On June 3, 1987, the California Supreme Court granted review limited to that issue. (Jurisdictional Statement, Appendix B.) California Rules of Court, Rule 29.2(b). Oral argument took place on September 8, 1987 and the matter is now submitted to the California Supreme Court. No judgment has been entered in either the Pacific Gateway or the Crocker case. If the California Supreme Court were to reverse that portion of the California Court of Appeal's ruling striking down the retroactive application of the transit fee to Pacific Gateway and Crocker, these appellees would then file their own appeal to this Court from the resulting judgment. That appeal would include the challenges to the transit fee under the Takings Clause, the Due Process Clause and the Equal Protection Clause that appellees raised in the California courts and are raised here by appellant.

system, at a deficit, with operating costs exceeding fare revenues and federal and state grant monies. This deficit was historically financed from the City's general fund. Upon the passage of Proposition 13, San Francisco officials contemplated that the newly enacted limitations on the City's ability to increase property tax revenues would limit the availability of monies from the general fund to meet the Municipal Railway's operating deficit. These officials contemplated that new funding sources would therefore be required to finance the Municipal Railway. (Joint Appendix Exhibits 64, 67 and 68.)[2]

In response to the passage of Proposition 13, the City began investigating potential new revenue sources for the Municipal Railway. City officials considered the creation of a special assessment district encompassing downtown San Francisco (*Id.*). They also considered the enactment of a variety of special taxes to partially underwrite the Municipal Railway's operating deficit. (Joint Appendix Exhibits 85, 86, 91 and 92.) Ultimately, attempts to finance the Municipal Railway through an assessment district or special taxes were abandoned as impractical because of the requirements of California law.[3]

Instead, in early 1980, City officials seized upon the concept of using a "development fee," applicable only to new downtown office buildings and imposed as a condition to the issuance of building permits, as the most politically feasible new revenue source for the Municipal Railway. (Joint Appendix Exhibit 85.)

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[2] In the consolidated proceedings before the California Court of Appeal, appellees proceeded by a joint appendix in lieu of a clerk's transcript. California Rules of Court, Rule 5.1(b). The designated references are to the Joint Appendix in the California Court of Appeal.

[3] California law places legal and practical constraints upon local governments' ability to levy assessments and special taxes. The formation of an assessment district requires a showing of special benefit to the affected properties and is subject to rights of majority protest. California Constitution Article XVI, § 19. Local governments can levy "special taxes" only with a two-thirds vote of the electorate. California Constitution Article XIIIA, § 4. *See Candid Enters., Inc.* v. *Grossmont Union High School Dist.*, 39 Cal. 3d 878, 882, 705 P.2d 876 (1985).

To generate the desired new revenue, the City made projections which purported to justify a $5 per square foot fee. This figure was stated to reflect the present value of the *projected deficits* that the Municipal Railway would incur over a *45-year period* in providing peak period transit service to the additional riders who it estimates will use the public transit system to commute to and from their jobs in newly constructed downtown offices.[4]

As the Court of Appeal decision states, "the fee [was] designed to provide *revenue* for the San Francisco Municipal Railway system" to accommodate the peak period riders employed in new downtown offices. (Jurisdictional Statement, Appendix A, p. A-2, emphasis added.) The transit fee was presented to the San Francisco Board of Supervisors in 1981 as part of a "revenue package" formulated by City officials in response to Proposition 13 in order to supplement the Municipal Railway's budget. (Trial Exhibit 502.) As calculated and applied, the transit fee indeed provided a generous new revenue source to the City. Based upon the City's 45-year projections of *operating* and capital deficits and its insistence that these projected costs be calculated "up front" in a single lump sum, property owners are subjected to multi-million dollar fees as a condition to the occupancy of their buildings.

"Development fees" have previously been used to finance the acquisition or construction of schools, parks, recreation lands and other real improvements or facilities. They have been based upon the rationale that new development has caused a special need for such improvements—and will derive special benefit from them. *See* discusssion, § I, *infra*. The transit fee differs radically from any other development fee of which appellees are aware. Unlike any other development fee, the transit fee is primarily designed to

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[4] The transit fee thus imposes on a select group of property owners the burden of subsidizing the costs of potentially self-supporting public transit, which the City for political and social reasons chooses to provide to the public at below-cost fares. This "subsidy" and its burden on the general fund is the only "cost" that the City seeks to recoup or mitigate by the transit fee. The use of a fee to impose the cost of such a subsidy upon private parties in itself effects an unconstitutional taking. *Property Owners Ass'n* v. *Township of N. Bergen*, 74 N.J. 327, 378 A.2d 25, 29-30 (1977).

recoup and defray the ongoing *operating costs* of the San Francisco Municipal Railway. (Trial Exhibits 39 and 54.)[5] Thus, the transit fee's proceeds will be used to pay for bus driver salaries, fuel, maintenance and innumerable other *operating costs. (Id.)* These are not costs or burdens that only new office development imposes upon the City and its general fund. On the contrary, by the City's own admission, *all downtown office buildings (whenever they were built) generate identical ongoing ridership demands* on the San Francisco Municipal Railway. (Trial Exhibit 54.) The City incurs and will continue to incur *ongoing* operating costs to provide public transit to all of these structures. All of these buildings benefit equally from the continued operation of the Muncipal Railway and the City's political decision to subsidize its operation.[6]

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[5] The transit fee ordinance provides that the proceeds of the fee shall be used "for the provision of peak period public transit service . . . to defray capital *and operating costs* incurred by the City . . . " (Jurisdictional Statement, Appendix F, pp. F-10 and F-11.) In fact, operating costs comprise the lion's share of the costs projected by the City to support the transit fee. (Trial Exhibits 39 and 54.) Under the Ordinance, the City is free to apply *all* of the proceeds of the transit fee to these projected operating costs.

The "capital" costs included in the City's projections underlying the transit fee are the costs of acquiring and replacing vehicles such as busses and trolly cars. Because these vehicles all have finite lives and require ongoing replacement, even these projected "capital" costs reflect the type of "burden" which all downtown properties continue to impose on the Municipal Railway. *See* discussion, § I, *infra.*

[6] For example, the Transamerica Pyramid is a well recognized downtown office building on the San Francisco skyline, constructed prior to 1979. That building "generates" Municipal Railway ridership at the same rate per square foot as appellees' projects. Because the Transamerica Pyramid has *more* square feet than either of appellees' projects, it actually generates *more* peak period Municipal Railway riders (and therefore more ongoing operating costs) than either of appellees' projects. The same could be said for innumerable other downtown San Francisco offices built prior to 1979, some of which are *four times* the size of appellees' buildings. (Joint Appendix Exhibit 94.) None of these buildings are subject to the transit fee.

In attempting to recoup the ongoing costs of providing a public service such as the Municipal Railway, the transit fee is indisputably unlike any police power exaction or condition that has ever passed judicial muster.[7] No other court has ever held that a "development fee" may be used to finance the ongoing costs of a municipal service. No other court has ever held that a development fee could be used to finance the ongoing costs of operating (as opposed to acquiring or constructing) local school, library or fire facilities. No other court has ever held, for instance, that a development fee may be used to defray police, firefighter, teacher or transit worker *salaries*. No other court has ever held that an exaction designed to recoup these types of costs (which all property owners impose on the local government on an ongoing basis) could be levied against developers of new property alone. The California courts' validation of the use of a development fee to so finance the Municipal Railway is simply without precedent in the cases.

In light of the foregoing, counsel for the City aptly described the California Court of Appeal's decision upholding the transit fee as "breaking new ground" nationally.[8] Nothwithstanding the unprecedented characteristics of the transit fee and the enormous import of its ruling, the California Court of Appeal, at the City's

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[7] The California Court of Appeal simply glossed over this critical distinction between the transit fee and all other development fees, stating "[t]here is little difference between these public improvements [streets, sewers, parks and lights] and the benefits to the public from the increased transit services paid for by the transit fee." (Jurisdictional Statement, Appendix A, p. A-5.) This statement simply ignores the real difference between the transit fee and all other development fees and its constitutional significance. *See* discussion, § I, *infra*.

[8] A January 22, 1987 San Francisco Examiner article on the California Court of Appeal's decision reported as follows:

> The appeals court ruling is significant because it "breaks new ground" nationally, observed Jerome Falk, a private attorney representing The City. "There has never been a development fee for transit anywhere in the country," Falk said, adding that the decision supports establishment of development fees by cities to fund *services* other than the more traditional schools, parks and roads.

urging, rejected appellees' constitutional challenges to the Ordinance without any analysis of governing Fifth Amendment principles.[9] Thus, the California Court of Appeal dismissed appellees' Takings Clause in *less than one sentence.* (Jurisdictional Statement, Appendix A, p. A-9.) The Court of Appeal's decision does not include *a single citation to any of this Court's opinions construing the Fifth Amendment's Takings Clause. (Id.)* Instead, the California Court of Appeal stated:

> We are mindful of the local government's need to generate revenue to maintain the quality of life the residents of the city have come to expect. This has become increasingly difficult in the post-Proposition 13 era.

(*Id.* at p. A-11.)

The California Court of Appeal has simply ignored the basic principle that underlies the Takings Clause:

> [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way of paying for the change. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922).

The ruling below ignores appellees' rights under the Fifth and Fourteenth Amendments. It specifically ignores the Fifth Amendment principles under which development conditions such as the transit fee must be judged under this Court's decision in *Nollan v. California Coastal Commission,* 107 S. Ct. 3141 (1987). The ruling below, which the City's counsel has already heralded to the nation's municipalities as providing a blueprint for the formulation of similar fees, will profoundly impact against the rights of property owners throughout the United States if not reversed by this Court.

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[9] In the California courts the City argued that the Fifth Amendment simply had *no* application to development fees or, alternatively, entailed a standard of review no different from that applied to a substantive Due Process challenge. (Joint Appendix Exhibits 31 and 32.) Based on these arguments, the trial court also summarily dismissed appellees' Takings Clause argument in a *single, two-sentence paragraph.* (Jurisdictional Statement, Appendix D, p. D-8.)

THE QUESTIONS ARE SUBSTANTIAL

I

THE FIFTH AMENDMENT PROHIBITS THE USE OF A DEVELOPMENT FEE TO FINANCE THE OPERATING COSTS OF A PUBLIC TRANSIT SYSTEM SUCH AS THE MUNICIPAL RAILWAY

"Development fees" have their origin in cases which recognize the power of local government to condition development upon the dedication of land for public works and facilities (*e.g.*, sewers, streets and public lighting) necessary to service the improved property. Such dedication requirements, typically imposed in the subdivision context, have been upheld in California and other jurisdictions. *See Ayres v. City Council of Los Angeles,* 34 Cal. 2d 31, 207 P.2d 1 (1949); *Pioneer Trust & Sav. Bank v. Village of Mount Prospect,* 22 Ill. 2d 375, 179 N.E.2d 799 (1961); *Jordan v. Village of Menomonee Falls,* 28 Wis. 2d 608, 617-18, 137 N.W.2d 442, 447 (1965), *appeal dismissed,* 385 U.S. 4 (1966).

"Development fees" are a direct outgrowth of these types of dedication requirements. Many statutes and local ordinances give developers or subdividers the option of paying an "*in lieu*" fee in order to finance the sort of public improvements that would otherwise have justified a dedication condition. *See Call v. City of West Jordan,* 614 P.2d 1257, 1258 (Utah 1980); *Collis v. Bloomington,* 310 Minn. 5, 246 N.W.2d 19 (1976); *Briar West, Inc. v. Lincoln,* 206 Neb. 172, 291 N.W.2d 730 (1980); *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802 (Tex. 1984). Fees have also been used *in lieu* of dedication where the burden posed by cumulative development and addressed through the development condition required the acquisition of offsite facilities such as schools or park and recreation facilities. *Associated Home Builders, Inc. v. City of Walnut Creek,* 4 Cal. 3d 633, 484 P.2d 606, *appeal dismissed,* 404 U.S. 878 (1971); *McLain Western #1 v. County of San Diego,* 146 Cal. App. 3d 772, 194 Cal. Rptr. 594 (1983); *Trent Meredith, Inc. v. City of Oxnard,* 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981); *Jenad, Inc. v. Village of Scarsdale,* 18 N.Y.2d 78, 218 N.E.2d 673, 676 (1966).

Consistent with their origin in "dedication" conditions, development fees enacted heretofore by state and local governments, *without exception,* have been limited to financing the acquisition of land or the construction of real improvements or facilities. The rationale for these exactions has been uniformly stated in the following terms. New development places a special burden upon local government by requiring the acquisition of additional "infrastructure" in the form of streets, sewer systems, schools, parks and other *improvements or facilities.* Because the need for these facilities is caused by the subdivision or other project for which a permit is sought (or that project in combination with other cumulative development), and this property will specially benefit from the public improvements, it is reasonable to assign the costs of these new facilities to the property owner seeking a building permit. *See Town of Longboat Key v. Lands End, Ltd.,* 433 So. 2d 574, 576 (Fla. App. 1983); *Lampton v. Pinaire,* 610 S.W.2d 915, 919 (Ky. Ct. App. 1980); *Missouri ex rel. Noland v. St. Louis County,* 478 S.W.2d 363, 367 (Mo. 1972); *Briar West, Inc. v. City of Lincoln,* 206 Neb. 172, 291 N.W.2d 730, 731-33 (1980); *Longridge Builders, Inc. v. Planning Bd.,* 52 N.J. 348, 350-51, 245 A.2d 336, 337-38 (1968); *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802, 804 (Tex. 1984); *Board of Supervisors v. Rowe,* 216 Va. 128, 136-39, 216 S.E.2d 199, 207 (1975); *Jordan,* 28 Wis. 2d at 617.

No case has ever held that the proceeds of a development fee could be used to finance the "operating" or "service" costs of a municipality. An early leading article on the subject of development fees rejected this very notion. In Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions,* 73 Yale L.J. 1119, 1121 (1964) the authors note the absence of any rationale that would support the use of development fees to collect the operating costs of providing a municipal service, stating:

> The revenue burden *for services* is cast equitably on *new and old residents.* The taxes of the old residents have been paying for a certain number of employees. New employees are added to service new residents. But the cost of the new

> employees probably is covered by the taxes levied on the new residents; hence the burden on older residents is not affected appreciably unless the newcomers demand increased service levels. In such case the old residents share equally in the increased levels (citation omitted) (emphasis added).[10]

The Takings Clause of the Fifth Amendment prohibits the inequity of the City's attempted use of the transit fee to finance its Municipal Railway. The transit fee violates the basic Fifth Amendment protection consistently identified in this Court's decisions of the last decade construing the Takings Clause. *Nollan v. California Coastal Comm'n,* 107 S. Ct. 3141, 3147 n.4 (1987); *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163 (1980); *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 82-83 (1980); *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 147-48 (1978) (Rehnquist, J., dissenting). As this Court has repeatedly stated, the Fifth Amendment

> prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him. *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 325 (1893).

As stated in *Armstrong v. United States,* 364 U.S. 40, 49 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone

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[10] Ignoring these notions of equitable taxation, the transit fee assigns the operating costs of the Municipal Railway to new developers and ignores entirely the future property tax payments that will be generated by their office buildings. (Trial Exhibits 39 and 54.) This is particularly unfair in that under California's Proposition 13, the newly developed properties will also be required to make *higher effective property tax payments* than those buildings which are excluded from the fee. California Constitution, Article XIIIA, § 1.

> to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

The transit fee conditions the grant of a development permit upon a property owner's willingness to "ante up" monies to finance a public service that benefits all property owners and to defray costs that all property owners, not just developers, "cause" the Municipal Railway to incur. If a development fee could be used for these purposes, local governments would be free to condition building permits upon the forced contribution of funds for virtually any public service.[11] The "transit fee" is simply a form of prepaid property tax, discriminatorily applied to a handful of property owners.[12] It violates the central purpose underlying the Fifth Amendment's Takings Clause prohibition.

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[11] It is likely that local governments, particularly in post-Proposition 13 California, will view development fees as a fiscal panacea in light of the ruling below. *See Candid Enters., Inc.* v. *Grossmont Union High School Dist.*, 39 Cal. 3d 878, 882 (1985). The City has already enacted another office development fee, intended to finance *child care costs* allegedly generated by downtown office development. San Francisco Planning Code § 315.

[12] The mere labeling of an exaction as a development fee will not prevent judicial inquiry as to its true nature. An exaction denominated as a development fee violates the Fifth Amendment where, as here, it is a guise or substitute for taxation or "a forced contribution to general governmental revenues . . . " *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980). Local government cannot seize upon a property owner's application for a building permit as an opportunity to "extort" a contribution to meet that government's revenue requirements. *Nollan* v. *California Coastal Comm'n*, 107 S. Ct. 3141, 3148 (1987); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972); *J.E.D. Assocs., Inc.* v. *Town of Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981).

II

THE TAKINGS CLAUSE AND THE DUE PROCESS CLAUSE PROHIBIT AN EXACTION SUCH AS THE TRANSIT FEE THAT IS BASED UPON PROJECTIONS OF COSTS WHICH LOCAL GOVERNMENT MAY NEVER IN FACT INCUR

Even if it were appropriate to use a development fee to finance the Municipal Railway's deficit, the City's use of a lump sum exaction to collect "costs" which are projected over a 45-year period unreasonably impinges on the property owner's Fifth Amendment rights. A fee cannot be used to recoup entirely speculative costs. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155 (1980). This is precisely what the "lump sum" transit fee does. There is no certainty or even reasonable probability that all or any significant portion of the $5 per square foot fee collected by the City will actually be incurred as a "cost" over this 45-year period.[13]

Even if the City ultimately incurred the costs claimed to justify the $5 per square foot fee, this would only occur after many years. In the interim, property owners required to pay the fee would be deprived of the use of their money. The transit fee's use of the lump sum exaction is a naked attempt by the City to deprive developers of the use of their money, appropriating the value of that use for the City's own benefit. This aspect of the transit fee in itself violates the Fifth Amendment. *First English Evan. Luth. Church* v. *County of Los Angeles,* 107 S. Ct. 2378 (1987).[14]

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[13] Unlike other development fees, the transit fee provides no mechanism for adjustment of the $5 fee in the event that the projected costs upon which it is based do not eventuate. *J. W. Jones Cos. v. City of San Diego,* 157 Cal. App. 3d 745, 750, 203 Cal. Rptr. 580 (1984).

[14] Two state courts have struck down dedication conditions "for the purpose of 'banking' the land for use in a projected but unscheduled possible future use." *181 Incorporated* v. *Salem County Planning Bd.,* 133 N.J. Super. 350, 359, 336 A.2d 501, 506 (1975), *modified,* 140 N.J. Super. 247, 356 A.2d 34 (1976); *Simpson* v. *City of North Platte,* 206 Neb. 240, 292 N.W.2d 297, 301-02 (1980).

Even if the financing of the Municipal Railway's operating deficit were a legitimate object of a development fee, the means chosen to implement that object must be "reasonably necessary for the accomplishment of [that] purpose and not unduly oppressive on individuals." *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594-95 (1962), quoting *Lawton v. Steele,* 152 U.S. 133, 137 (1894). The transit fee cannot withstand scrutiny under this standard. There is *no* reason that the City could not annually compute and assess *as actually incurred* the costs it purports to recoup with the fee. By collecting 45-years' worth of merely projected costs in a lump sum, the City simply advances its revenue objectives at the expense of property owners' legitimate Fifth Amendment interests.

III

THE TRANSIT FEE VIOLATES THE EQUAL PROTECTION CLAUSE

The transit fee discriminates by assigning the cost of expanding mass transit, to meet the growing demands of an urban community only to developers of new downtown office space. The effect of the transit fee is to exempt all owners of property developed prior to 1979 from sharing in the City's claimed costs of this expansion—even though every square foot of existing office space in the downtown area has created and continues to contribute to the "peak demand" which generates the need for expansion of Municipal Railway service. (Trial Exhibit 54.)

Exactions such as the transit fee, which single out developers to pay for government services whose costs are equally caused and whose benefits are equally enjoyed by other property owners not specially taxed, discriminate in a manner that violates the Equal Protection Clause. *Nollan v. California Coastal Comm'n,* 107 S. Ct. 3141, 3147 n.4 (1987). The premise of the transit fee is that existing property owners or residents (presumably by virtue of their prior tax contributions) somehow acquire a higher right or entitlement to government services than is enjoyed by the new-

comer.[15] This Court struck down an Alaska statute apportioning state benefits on the basis of just such classification. As stated in *Zobel v. Williams*, 457 U.S. 55, 64 (1982):

> Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible (citations omitted).

CONCLUSION

For all the foregoing reasons, this Court should note probable jurisdiction of the Russ Building Partnership's appeal.

Respectfully submitted,

JAMES P. BENNETT
(Counsel of Record)
LEIGH R. SHIELDS
MORRISON & FOERSTER
345 California Street
San Francisco, California
94104-2105
Telephone: (415) 434-7000
Attorneys for Appellees Pacific Gateway Associates Joint Venture, Crocker National Bank and Crocker Properties, Inc.

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[15] For the reasons noted above, such a classification in the present case, where pre-existing property owners continue to "burden" the Municipal Railway in precisely the manner that new development is claimed to, is without any substantial economic rationale. *See* Heyman & Gilhool, *Increased Community Cost, supra,* 73 Yale L.J. at 1120-21.